NO. 44337-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LEANNE BECHTEL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John McCarthy

No. 11-1-01077-7

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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B. STATEMENT OF THE CASE.

1. Procedure

On March 14, 2011, the Pierce County Prosecuting Attorney (State) filed an Information charging the defendant, Leanne Bechtel, with one count of murder in the second degree. CP 1-2. The State also alleged

two aggravating circumstances: that the victim was particularly vulnerable, and that the defendant was in a position of trust. *Id.*

On September 7, 2012, the case was assigned to Hon. John McCarthy for trial. 1 RP 3. The defendant filed a motion to exclude testimony of an expert in biomechanics. CP 33. After hearing argument, the court denied the motion. CP 399-400.

After hearing all the evidence, the jury found the defendant guilty as charged. CP 401. The jury also returned special verdicts, finding the charged aggravating circumstances. CP 402, 403.

Before sentencing, the defendant filed a motion for a new trial, pursuant to CrR 7.5(a)(2) regarding jury misconduct. CP 404-407. After hearing argument, the court denied the motion. 11/16/2012 RP 11-15.

On November 16, 2012, the court imposed a standard range sentence of 234 months in prison. CP 523. The defendant filed a timely notice of appeal on December 17, 2012. CP 536.

2. Facts

On April 30, 2008, medical aid was summoned to the small, one bedroom apartment where victim A.F. lived with her father and the defendant; 12916 Lincoln Ave. S.W. in Lakewood, Wa. 4 RP 194, 5 RP 336; Exh. 135. Paramedics found the victim, a 31/2 year-old girl, non-responsive on the floor by the living room couch. 4 RP 198, 202. The defendant told the paramedics that their pit-bull dog had knocked the victim off the couch. 4 RP 198.

The victim was unconscious. 4 RP 202. Her pupils were fixed and dilated. *Id.* She had no pulse. *Id.* The victim was transported to Mary Bridge Children's Hospital (MBCH) in Tacoma. 4 RP 215.

Emergency room staff found that the victim had a very low temperature of 92.1°. 5 RP 274. Computer-assisted tomography (CT) and standard x-rays showed that the victim had what initially appeared to be two skull fractures: one of the occipital bone and one in the parietal area. 5 RP 283. The victim had three different intra-cranial bleeding spots; two were recent, one was older. 5 RP 284.

These injuries and the victim's condition were extremely serious. 5 RP 293. Because the severity of the injuries and the force required to cause them were inconsistent with the accident scenario described by the defendant, the ER doctor suspected child abuse or "non-accidental trauma." 5 RP 291. He reported the case to authorities. 5 RP 292. The victim was moved to the pediatric intensive care unit (PICU). 5 RP 291.

Additional examination and treatment in the PICU confirmed that the victim had a massive skull fracture that crossed suture lines. 6 RP 480-481, 487, 648. The fracture began in the back of the skull, extended all the way down to the foramen magnum at the base of her skull and out nearly to the front. 6 RP 649. The victim also suffered a devastating brain injury.

6 RP 484. The whole left side of her brain was swelling from edema. 6 RP 651. She had extensive retinal hemorrhages in both of her eyes. 6 RP 470, 7 RP 747. It was later discovered that she had bleeding in the optic nerve sheath behind her eyes. 7 RP 737, 9 RP 1108.

The swelling in the victim's brain required immediate surgery. 7 RP 688. To relieve intra-cranial pressure, a neurosurgeon removed a large section of the left side of the victim's skull. 7 RP 697. When the bone "flap" was removed, the brain swelled so rapidly that it was difficult to sew the incision closed. 7 RP 702. The victim's brain injuries were so severe that they quickly resulted in her death. 6 RP 530-531, 9 RP 1183, 11 RP 1286, 1319.

During the autopsy, doctors discovered that the victim had an older fracture of the frontal area of the skull. 7 RP 737-738. The victim had signs of a prior very significant injury to the frontal lobe of her brain. 7 RP 765, 9 RP 1158. Her brain was scarred from previous injury. 7 RP 736, 9 RP 1160.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EXPERT TESTIMONY REGARDING BIOMECHANICAL ENGINEERING.

a. A ***Frye*** hearing was unnecessary because the fundamental principles of physics and fall biomechanics are not "new and novel" science.

A trial court has broad discretion to admit or exclude expert testimony. "The broad standard of abuse of discretion means that courts can reasonably reach different conclusions about whether, and to what extent, an expert's testimony will be helpful to the jury in a particular case." ***Stedman v. Cooper***, 172 Wn. App. 9, 18, 292 P.3d 764 (2012). *See, also*, ***Ma'ele v. Arrington***, 111 Wn. App. 557, 45 P.3d 557 (2002).

Washington adopted and retains the ***Frye*** test for determining if evidence based on novel scientific procedures is admissible. ***State v. Copeland***, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996). In ***Frye v. United States***, 293 F. 1013 (D.C. Cir. 1923), the court determined that the results of a "deception test" (polygraph) were not admissible. The court discussed the standards with which new scientific evidence should be admitted. The court stated:

> Just when a scientific principle or discovery crosses the line between the experimental and the demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Frye, 293 F. at 1014.

Evidence deriving from a scientific theory or principle is admissible only if that theory or principle has achieved general acceptance in the relevant scientific community. ***State v. Martin***, 101 Wn.2d 713, 719, 684 P.2d 651 (1984). "***Frye*** requires only general acceptance, not full acceptance, of novel scientific methods." ***State v. Russell***, 125 Wn.2d 24, 41, 882 P.2d 747 (1994). If the methodology is generally accepted, the possibility of error in the expert opinions can be argued to the jury. *Id.* The ***Frye*** test is unnecessary if the evidence does not involve new methods of proof or new scientific principles. ***In re Detention of Halgren***, 156 Wn.2d 795, 132 P.3d 714 (2006).

The Supreme Court recently emphasized in ***Lakey v. Puget Sound Energy***, 176 Wn.2d 909, 919, 296 P.3d 860 (2013) that ***Frye*** is implicated only where the scientific methodology itself is novel, not where an expert engages in an established methodology of questionable accuracy. While ***Frye*** governs the admissibility of novel scientific testimony, the

application of accepted techniques to reach novel conclusions does not raise ***Frye*** concerns. ***Lakey,*** 176 Wn.2d at 919.

" 'Once a methodology is accepted in the scientific community, then application of the science to a particular case is a matter of weight and admissibility under ER 702, which allows qualified expert witnesses to testify if scientific, technical, or other specialized knowledge will assist the trier of fact.' "***Anderson v. Akzo Nobel Coatings, Inc.***, 172 Wn.2d 593, 603, 260 P.3d 857 (2011) (quoting ***State v. Gregory***, 158 Wn.2d 759, 829–30, 147 P.3d 1201 (2006)).

Biomechanical engineers apply "the principles in mechanics to the facts of a specific accident and provide information about the forces generated in that accident." ***Bowers v. Norfolk Southern Corp.*** 537 F.Supp.2d 1343, 1377 (M.D.Ga. 2007); ***Smelser v. Norfolk S. Ry. Co.***, 105 F.3d 299, 305 (6th Cir.1997), *abrogated on other grounds*, ***Morales v. Am. Honda Motor Co.***, 151 F.3d 500, 515 & n. 4 (6th Cir.1998). Biomechanics "is the study of forces acting upon and the motion of the human body. The study of biomechanics is concerned with the response of living matter to forces." The Use of Biomechanical Experts in Product Liability Litigation, 46 Am. Jur. Trials 631 §1 (1993).

Appellate recognition of a scientific theory renders a ***Frye*** hearing unnecessary in subsequent cases on the same scientific theory. Federal and state courts have long recognized that biomechanical engineering evidence regarding the amount of force in collisions is not "new and

novel" science. Numerous state and federal courts have held biomechanical engineering evidence meets the ***Frye*** and ***Daubert***[1] tests and that it is admissible pursuant to ER 702. *See, e.g.*, ***Ma'ele v. Arrington***, 111 Wn. App. at 563 (biomechanical engineer properly allowed to testify about the amount of force involved in low-speed collisions because field is generally accepted in the scientific community); ***State v. Phillips***, 123 Wn. App. 761, 98 P.3d 838 (2004) (accident reconstruction, used by State's expert in prosecution for vehicular homicide, is appropriate because principles used generally accepted within the scientific community); ***Valentine v. Grossman***, 283 A.D.2d 571, 724 N.Y.S.2d 504 (2001) (error to exclude biomechanical expert testimony as to whether forces generated in accident were sufficient to cause herniated discs); ***Cardin v. Christie***, 283 A.D.2d 978, 723 N.Y.S.2d 912 (2001) (expert opinion proper regarding force of impact insufficient to cause injuries); ***Smelser v. Norfolk Southern Ry. Co.***, 105 F.3d 299, 305 (6th Cir. 1997) (court finding that "biomechanics are qualified to determine what injury causation forces are in general and can tell how a hypothetical person's body will respond to those forces" but not qualified to render opinion as to precise cause of a specific injury); ***Bowers v. Norfolk Southern Corp.***, 537 F.Supp.2d 1343 (2007)(biomechanical engineer

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[1] ***Daubert v. Merrell Dow Pharmaceuticals., Inc.***, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

appropriately testified to the effects of locomotive vibration on human body and types of injuries that could result). As the ***Bowers*** court noted, "[i]n the context of litigation, therefore, biomechanical engineers typically are found to be qualified to render an opinion as to the forces generated in a particular accident and the general types of injuries those forces may generate." 537 F. Supp. 2d at 1376. Biomechanical engineering principles have been applied to all manners of physiological injuries and situations requiring calculations of the measure of force on the human body.

In ***Ma'ele v. Arrington***, 111 Wn. App. 557, 560, the defendant sought to introduce testimony from a biomechanical engineer that the force generated from a collision of two motor vehicles was insufficient to produce the injuries sustained by the plaintiff. At trial, the biomechanical engineer testified that he "calculated the maximum force that could have impacted [the plaintiff's] body, opining that his own and other research shows that such force does not injure people." *Id.* at 561-562. The Supreme Court affirmed the introduction of the testimony based on the expert's qualifications and the relevance of the testimony to the jury.

Applying that principle to the present case, there is no distinction between the methodology used in ***Ma'ele*** and the methodology used by the biomechanical expert called by the State, Dr. Hayes. Dr. Hayes' opinion in this case was directly analogous to the expert opinion approved in ***Ma'ele***. Although factual distinctions can be made between the two

cases, the principles underlying the methodology are the same. The expert in ***Ma'ele*** was no more a witness to the collision at issue in that case than Dr. Hayes was to the alleged collision in this case, yet experts were properly permitted to draw conclusions from the data that was available.

In ***State v. Phillips***, *supra*, the Court affirmed the admission of accident reconstruction evidence in a prosecution for vehicular homicide. The mechanical engineer analyzed the accident and used a computer program to perform the physics calculations from data to reconstruct and simulate the incident. 123 Wn. App. at 764. The question before the Court was whether the computer program used satisfied ***Frye***. However, the methodology used by the expert there is similar to the methodology used in the present case. In fact, as the ***Phillips*** court pointed out "other jurisdictions have accepted accident reconstruction software and computer simulations as based on the application of long-standing scientific principles." *Id.* at 769 (string citation omitted).

Accident reconstruction is routinely used and accepted in all manner of legal disputes. *See, e.g.*, ***Phillips***, 123 Wn. App. at 766 (citing additional cases). The work done in the present case was similar to the work done in accident reconstruction, in that data is collected from a review of the materials available, the laws of physics are applied to the data, and conclusions are drawn.

Here, the victim's injuries and cause of death was not in dispute: she suffered massive head trauma. The factual issue was how she suffered this trauma, and whether the defendant's scenario and theory could have produced enough force to crush the victim's skull.

Dr. Hayes, the biomechanical engineer, testified regarding calculations and opinion regarding the amount of force necessary to cause a certain level of damage or injury to the human body. Contrary to the defendant's contention (App. Br. at 16), Dr. Hayes did not comment on the defendant's credibility.

It is certainly permissible, and even likely, for one party in a criminal trial to call witnesses and offer evidence to refute the theory or contentions of the opposing side. This is fairly common in child abuse, or "non-accidental trauma", cases where no adult witnesses the incident. ***State v. Fero***, 125 Wn. App. 84, 104 P.3d 49 (2005), is very similar to the present case.

Fero was charged with first degree assault of a 15–month–old child she babysat. The child had some of the same injuries and required the same surgery as the victim in the present case. The State's theory and argument was injury by "shaken-baby syndrome". 125 Wn. App. at 87. The defense countered with the theory and argument that the victim's 4 1/2–year–old half-brother caused her injuries. *Id.*, at 88. At trial, the State called several witnesses to prove causation and to refute the defense's

theory. *Id.* The defendant appealed her conviction, arguing, among other things, sufficiency of the evidence that she caused the child's death.

In ***Fero***, as in the present case, several medical doctors testified that the victim's injuries were inconsistent with, or could not be caused by, the theory put forward by the defense. *Id.*, at 93-94. In the present case, nine medical doctors testified, including one called by the defendant. All eight of the doctors called by the State testified that the injuries were inconsistent with, or could not have been caused by, the defendant's scenario of a dog knocking the victim off the couch. *See, e.g.*, 5 RP 306, 6 RP489, 6 RP 659, 7 RP 703, 744, 9 RP 1112, 9 RP 1153, 1170, 11 RP 1306.

Even the defendant's expert, Dr. Stephen Glass, testified that the chances of defendant's scenario producing such injuries was one in one million. 12 RP 1553. He further agreed that the force required to produce the victim's bilateral retinal hemorrhages was inconsistent with the defendant's account. 12 RP 1556, 1560.

b. Because biomechanical engineering evidence is not new or novel, defendant's arguments went only to the weight of the evidence, not to its admissibility.

Debate over the proper application of established scientific laws and theories is a matter left to the trial court and the trier of fact. A ***Frye*** hearing resolves only whether there is general acceptance in the relevant

scientific community of the theory and of the technique used to implement the theory. ***State v. Martin***, 101 Wn.2d 713, 719, 684 P.2d 651 (1984). It is not a forum for attacking specific details of a theory, or which technique is best for implementing a theory: these matters go to the weight of the evidence and not its admissibility. *See, e.g.* ***Copeland***, 130 Wn.2d at 272; ***In re Detention of Thorell***, 149 Wn.2d 724, 725, 72 P.3d 798 (2004). If a party attacks only the contours of a scientific theory, rather than the underlying scientific proposition, there is no need for a ***Frye*** hearing. *See*, ***State v. Russell***, 125 Wn.2d 24, 50-51, 882 P.2d 747 (1994).

The defendant's claims went to the weight of the State's evidence, not its admissibility. *See*, ***Russell***, 125 Wn.2d at 41 ("If methodology is sufficiently accepted in the scientific community at large, concerns about the possibility of error or mistakes made in the case at hand can be argued to the fact finder.").

Frye is concerned with the core science behind a theory – in this case, whether the amount of force generated by the alleged fall and collision of the victim's head with the floor was sufficient to cause the fatal injuries. There was no real debate about the science and underlying physics principles utilized by Dr. Hayes. The trial court properly denied the defendant's motion for a ***Frye*** hearing and to exclude the expert's testimony.

The defendant disagreed with the opinions and evidence at trial. Understandably, she continues to do so on appeal. *See*, App. Br. at 19-23. But disagreement with opinions and conclusions from data or medical findings is a matter determined by the jury. It does not demonstrate abuse of discretion by the trial court. None of the medical testimony, nor that of Dr. Hayes, expressed an opinion regarding the defendant's credibility. The trial court did not commit error, and the testimony did not deny the defendant a fair trial.

c. The biomechanical engineering evidence assisted the jury in evaluating whether the victim's injuries could have been caused by the alleged fall as described by the defendant.

ER 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

There is no dispute that Dr. Hayes was a qualified expert in the field of biomechanical and mechanical engineering. The question for the court was whether his testimony would assist the jury in evaluating the evidence in this case.

The court could certainly find that the average individual does not understand the interplay between the laws of physics and the human body. The concepts are complex and not within the common understanding of a

lay person. When this type of scientific evidence is available, it is appropriate for it to be explained by a qualified expert. The biomechanical engineering evidence provided an analytical and explanatory framework to explain what the maximum force acting upon the victim's skull could have been in this case.

Dr. Hayes' testimony about the forces involved as described by the defendant, and the impact it would have had on Autumn's skull, helped the jury determine whether she was injured as a result of the alleged collision, or whether the injuries were inflicted in another way. Dr. Hayes did not offer an opinion as to how the victim's skull was fractured, but whether her skull could have been fractured in a collision as described by the defendant.

The defendant cites ***Stedman v. Cooper*** 172 Wn. App. 9, 292 P. 3d. 764 (2012) to support the argument that the State's evidence was not relevant. ***Stedman*** was a civil case regarding injury and damage in a low-impact automobile accident. The ***Stedman*** court excluded the biomechanical engineering citing to a Colorado case where the court "questioned the validity of using a series of tests designed for one purpose (designing cars) for a different purpose (assessing a threshold of applied force for injury in rear-end car accidents)." 170 Wn. App. at 70, citing ***Schultz v. Wells***, 13 P.3d 846, 849 (Colo. App. 2000). The ***Stedman*** court then concluded that there was a possibility that the biomechanical engineering evidence proffered in its case could mislead the jury. The

injured party had soft tissue injuries, no broken bones. The experience of a low-impact automobile accident was one that was within the common experience and understanding of a layperson. *Id.*, at 17. In ***Stedman***, the trial court exercised its discretion in excluding the expert testimony.

Stedman does not stand for the proposition that expert testimony regarding biomechanics is inadmissible, nor that it must meet the ***Frye*** test. The Court of Appeals noted that the same expert's testimony had been upheld as admissible in ***Ma'ele***. 172 Wn. App at 18. Under the abuse of discretion standard of review, different courts may reach different conclusions regarding admissibility of expert testimony without committing error. *Id.*

Here, the evidence was reliable and directly relevant to a material issue in this case; the force required to cause the injuries. The precise injuries were extreme; and were known because there was extensive examination at the hospital and then an autopsy. The testimony regarding biomechanics was also consistent with nine medical doctors. The court did not abuse its discretion in denying the defendant's motion to exclude.

d. Because the reenactment animation created by Dr. Hayes was based on facts provided by the defendant, the case materials, and reasonable assumptions based on the laws of physics, the court properly allowed the jury to view the animation to assist Dr. Hayes in the explanation of his conclusions.

It is not uncommon for visual aids to be created showing how an incident occurred. A trial court may admit demonstrative evidence when the experimental conditions are substantially similar to the facts of the case. ***State v. Finch***, 137 Wn.2d 792, 816, 975 P.2d 967 (1999). If substantially similar, then demonstrative evidence may be admitted when its probative value outweighs their prejudicial effect. ***State v. Rogers***, 70 Wn. App. 626, 633, 855 P.2d 294 (1993). As the defendant pointed out, "demonstrative evidence may be admissible if the experiment was conducted under conditions reasonably similar to conditions existing at the actual event. Whether the similarity is sufficient is for the trial court's discretion." ***Rogers***, 70 Wn. App. at 633-634. "The ultimate test for the admissibility of an experiment as evidence is whether it tends to enlighten the jury and to enable them more intelligently to consider the issues presented." ***Sewell v. MacRae***, 52 Wn.2d 103, 107, 323 P.2d 236 (1958).

As stated above, this type of re-creation evidence is routinely admitted in motor vehicle accident/collision cases. It is also routinely admitted in civil litigation personal injury cases. ***Jenkins v. Snohomish***

County Pub. Util. Dist. No. 1, 105 Wn.2d 99, 107, 713 P.2d 79 (1986). In ***Jenkins***, the trial court allowed admission of a video recording showing a boy about the size and age of the injured party engaging in actions that resulted in the injury. 105 Wn. 2d at 107. The admission of the video was affirmed despite the court acknowledging that the events in the video were not an exact representation as they occurred. *Id.* In affirming the trial court's ruling, the Court emphasized that the video depiction was sufficiently similar and that any differences were explained to the jury. *Id.* at 108. *See also*, ***Jones v. Halvorson-Berg***, 69 Wn. App. 117, 126-27, 847 P.2d 945 (1993) (admission of video taken ten years after event in question appropriate because any differences were addressed in testimony and cross examination); ***Kramer v. J.I. Case Mfg. Co.***, 62 Wn. App. 544, 554-55 815 P.2d 798 (1991) (court affirming introduction of video prepared to support argument that a properly operated backhoe could not have malfunctioned even when witness testified the slope on the day of the demonstration was more slippery on the day of accident.) Unless such incidents are recorded, a rare occurrence, each re-creation is always based on the best information available. Admission in evidence is within the discretion of the trial court.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING A MOTION FOR NEW TRIAL BASED UPON JURY MISCONDUCT.

A trial court's denial of a motion for a new trial will not be reversed on appeal unless there is a clear showing of abuse of discretion. *See*, ***State v. Pete***, 152 Wn.2d 546, 98 P.3d 803 (2004). Whether members of a jury have committed misconduct is a factual determination for the trial court whose finding will not be disturbed on review except for a clearly shown abuse of discretion. ***State v. Young***, 89 Wn.2d 613, 574 P.2d 1171 (1978).

CrR 7.5(a)(2) permits a trial court to grant a new trial on grounds that the jury committed misconduct. A new trial in a criminal proceeding is required only when the defendant has been so prejudiced that nothing short of a new trial can insure that he or she will be treated fairly. ***State v. Bourgeois***, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). The same is true in an instance of jury misconduct. ***State v. Reynoldson,*** 168 Wn. App. 543, 277 P.3d 700 (2012); ***State v. Barnes***, 85 Wn. App. 638, 932 P.2d 669 (1997). When the motion is based on matters outside the record, the facts shall be shown by affidavit. CrR 7.5(a).

As a general rule, the court is reluctant to inquire into how a jury arrives at its verdict. A strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain

verdicts and the jury's secret, frank and free discussion of the evidence. ***State v. Balisok***, 123 Wn.2d 114, 117-118, 866 P.2d 631 (1994).

Most frequently, jury misconduct that may be grounds for a new trial involves whether it considered extrinsic evidence. *See, e.g.*, ***State v. Balisok***, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). Deliberating jurors also commit misconduct if they refuse to follow the law, or engage in nullification *e.g.*, ***State v. Elmore***, 155 Wn.2d 758, 123 P.3d 72 (2005); when they fail to follow no-contact instructions, *e.g.* ***State v. Depaz***, 165 Wn.2d 842, 204 P.3d 217 (2009); or engage in improper discussion, such as speculation on why a case has gone to trial, *e.g.* ***State v. Applegate***, 147 Wn. App. 166, 194 P.3d 1000 (2008).

The party alleging juror misconduct has the burden to show that misconduct occurred. ***State v. Earl***, 142 Wn. App. 768, 774, 177 P.3d 132 (2008). In evaluating evidence of alleged juror misconduct, a court considers only the facts that are stated in relation to juror misconduct and that in no way inhere in the verdict itself. ***State v. Jackman***, 113 Wn.2d 772, 777-78, 783 P.2d 580 (1989).

All of the following factors and averments that inhere in the jury's processes in arriving at its verdict - and therefore, inhere in the verdict itself - are inadmissible to impeach the verdict: (1) the mental processes by which individual jurors reached their respective conclusions; (2) their motives in arriving at their verdicts; (3) the effect the evidence may have had upon the jurors, or the weight particular jurors may have given to

particular evidence; or (4) the jurors' intentions and beliefs. ***Jackman***, 113 Wn.2d 777-778; *see also* ***Gardner v. Malone***, 60 Wn.2d 836, 841, 376 P.2d 651, 379 P.2d 918 (1962) (if facts alleged are linked to the juror's motive, intent, or belief, or describe their effect upon the juror, the statements cannot be considered because they inhere in the verdict and impeach it). Further, when the jury is polled there is no doubt that the verdict was unanimous and was the result of each juror's individual determination. ***State v. Badda***, 63 Wn. 2d 176, 182, 385 P.2d 859 (1963).

In the present case, defense fails to provide any competent evidence of jury misconduct. Under CrR 7.5(a), when the motion is based outside of the record, the facts shall be shown by affidavit. The defendant's motion was not accompanied by any such affidavits provided by jurors. Furthermore, even if the defendant provided an affidavit from a juror the court is only permitted to consider facts that are stated in relation to juror misconduct and that in no way inhere in the verdict itself.

The court is not permitted to consider the weight an individual juror gave to the 911 call. That inheres in the verdict. It is improper for the court to consider the effect the evidence may have had upon the jurors, or the weight particular jurors may have given to particular evidence. ***Jackman***, 113 Wn. 2d at 778.

Under CrR 6.15(e), the jury "shall take with it ... all exhibits received in evidence" when it retires for deliberation. Once admitted into evidence, exhibits taken to the jury room may be used by the jury "as it

sees fit." ***State v. Elmore***, 139 Wn.2d 250, 295, 985 P.2d 289 (1999) (quoting ***Castellanos***, 132 Wn.2d at 97). A recorded statement of the defendant and a properly authenticated transcript thereof, may within the sound discretion of the trial court, be admitted as exhibits and reviewed by the jury during its deliberations. ***State v. Frazier***, 99 Wn. 2d 180, 188, 661 P.2d 126 (1983). Trial courts may properly allow jurors unrestricted access to audio recordings. ***State v. Castellanos***, 132 Wn.2d 94, 935 P.2d 1353 (1997). Permitting the jury unrestricted access to an audio or videotape exhibit, alone, is not an abuse of discretion. ***Frazier***, at 190; ***Castellanos***, 82 Wn. App. 204, 207, 916 P.2d 983 (1996), aff'd, 132 Wn.2d 94, 100 (1997).

In ***Castellanos***, over the defendant's objection, the trial court allowed the jury unlimited access to a playback machine and audio tapes of a drug buy during deliberations. Defense argued the repeated review of the tape could cause the jury to unduly emphasize the taped material. The court disagreed. The court reasoned the materials were nontestimonial and the jury could review the tapes at its discretion like any other piece of evidence. The ***Castellanos*** Court affirmed the defendant's conviction and found "the fact the jury had unlimited access to the recordings and could play them at its whim does not prove it gave undue prominence to the exhibit. The playback machine allowed the jury to utilize the exhibit tapes

as any other exhibit. "Withholding the machine would be like admitting a contract into evidence, but denying the jurors their eyeglasses to read it." ***Castellanos***, 132 Wn. 2d 94, 102.

Similarly, in the present case, the jurors were provided a recording of the 911 call as a stipulated exhibit and a playback machine to allow them unlimited access to the exhibit. The parties previously agreed to allow the jurors to have unlimited access to the 911 call. 12 RP 1592. The court provided a laptop computer to play the recording. The jurors only needed to notify the judicial assistant in order for her to set up the laptop. As previously ordered by the court, in order to allow the jurors to continue with deliberations, the judicial assistant left the courtroom once the exhibit was set up to play.

Ultimately, the courtroom became an extension of the jury room as the courtroom was closed while the jurors listened to the 911 call. The jurors were given the freedom to listen to as much or as little of the 911 call as they deemed necessary. Allowing the jurors to have unlimited access to the 911 call was stipulated by the parties and properly ordered by the court. The jurors did not commit misconduct by reviewing the exhibit.

The defendant argues that the jurors committed misconduct by over-emphasizing one piece of evidence, the 911 call, by a portion of the jury. App. Br. at 29. But, the court is not permitted to consider the effect one piece of evidence may have had upon the jurors, or the weight

particular jurors may have given to particular evidence. ***Jackman***, 113 Wn. 2d at 778. The admission of a tape recording as an exhibit, in and of itself, does not overly emphasize the importance of that evidence. *See*, ***Frazier***, 99 Wn.2d at 190.

The defendant argues the present case is similar to ***State v. Koontz***, 145 Wn. 2d 650, 41 P.3d 475 (2002). But, ***Koontz*** is distinguishable from the current facts. In ***Koontz***, over the defendant's objection, the trial court permitted the jury to review a video replay of actual in court *testimony*. The trial court played the testimony of three witnesses and the judge controlled the video. The videotapes were replayed in open court with the defendant present. The review of the video showed it was not a single continuous view of each witness. Instead, it consisted of a series of camera perspectives, including views of the attorneys, defendant and judge. Ultimately, the nature of the videotape allowed the jurors to focus on things they did not focus on during trial, as it did not replicate the testimony as originally presented during trial.

In ***Koontz***, the Court of Appeals noted that the replaying of the tape during deliberations allowed for a juror's attention to be captured by the cameras focus rather than directed by the juror's focus. This concerned the Court in that the video allowed jurors to hear and see more than the factual elements contained in the transcript. ***Koontz***, 145 Wn. 2d at 654-655. ***Koontz*** specifically recognized recorded trial *testimony* should not be treated the same as recorded *exhibits*. *Id.* at 658-659. The Court

overturned the defendant's conviction, as the unique nature of replaying videotaped testimony led to an improper repetition of the complete trial testimony without rebuttal. ***Koontz*** distinguished audio tape recordings as those in ***Frazier*** from the replaying of the video testimony. The Court stated "[o]ur jurisprudence regarding admitted sound or video exhibits is simply inapposite to the present case." ***Koontz***, at 659. Consequently, ***Koontz*** does not apply to the facts of the present case.

In the present case, three jurors remained in the closed courtroom, which, at the time, served as an extension of the jury room. The other nine jurors returned to the initial jury room. The door between the two rooms remained open, and the courtroom closed, during this time. The jurors who remained in the extension of the jury room finished reading the transcript of the call. They did not discuss the case. The other nine jurors did not discuss the case.

When the transcripts were returned to the judicial assistant, the jurors returned to the official jury room and the courtroom was reopened to the public. The jurors continued to deliberate in the jury room and reached a verdict. There is no evidence of improper separation or deliberation. The door between the rooms remained open. There is no evidence that the jurors discussed the case without all twelve jurors being present for discussion.

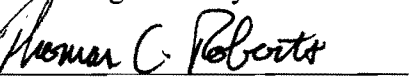
It is not misconduct for individual jurors to examine different exhibits simultaneously. It would certainly be permissible for three jurors, or only one, to listen to the 911 recording; as it would be for three jurors, or one juror, to examine a photograph, clothing, gun, or any other piece of evidence. The jurors did not deliberate separately. Defense has failed to meet its burden of proving misconduct occurred, the defendant was not unfairly prejudiced. The defendant's motion was properly denied.

D. CONCLUSION.

The trial court did not abuse its discretion in admitting the expert testimony regarding biomechanical engineering. There was no juror misconduct, so the trial court properly denied the defendant's motion for a new trial. For all the reasons argued above, the State respectfully requests that the conviction be affirmed.

DATED: October 29, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10-29-13 Leanne Kal
Date Signature

PIERCE COUNTY PROSECUTOR

October 29, 2013 - 1:40 PM

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